

Court of Appeals, State of Michigan

ORDER

People of MI v Willie Leon Jackson

Docket No. 281681

LC No. 07-028787-FH

Brian K. Zahra
Presiding Judge

Peter D. O'Connell

Kirsten Frank Kelly
Judges

The Court orders that the motion for reconsideration is GRANTED.

The Court, on reconsideration, corrects the error found in the first sentence of the second full paragraph on page four (4) of this Court's opinion issued April 14, 2009, which read, "The parties agree that the trial court calculated and relied on an incorrect guidelines range and that the correct guidelines range was 10 to 46 months," to read, "The parties agree that the trial court calculated and relied on an incorrect guidelines range and that the correct guidelines range was 9 to 34 months."

In all other respects this Court's opinion remains the same.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 02 2009

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEON JACKSON,

Defendant-Appellant.

UNPUBLISHED

April 14, 2009

No. 281681

Saginaw Circuit Court

LC No. 07-028787-FH

Before: Zahra, P.J., and O’Connell and K. F. Kelly, JJ.

PER CURIAM.

After a jury trial, defendant Willie Leon Jackson was convicted of one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to consecutive terms of two to ten years’ imprisonment for the felon-in-possession conviction and two years’ imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant’s convictions and remand for resentencing consistent with this opinion.

First, defendant claims that he received ineffective assistance of counsel because his counsel failed to move to suppress the admission of evidence that defendant’s landlord found additional handguns in defendant’s residence after defendant was arrested for the charged offenses in this case. Defendant claims that this evidence was inadmissible. Because defendant failed to move for a new trial or a *Ginther*¹ hearing, we review his claim of ineffective assistance of counsel for mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We review whether evidence has been properly authenticated for an abuse of discretion. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). “An abuse of discretion occurs when a trial court chooses an outcome falling outside the permissible principled range of outcomes.” *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

“To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

result of the proceedings would have been different.” *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). The defendant must overcome the strong presumption that his counsel’s performance constituted sound trial strategy. *Davis, supra* at 368.

Defendant argues that his counsel was ineffective at trial because he failed to challenge the admission into evidence of testimony regarding handguns and shells found in defendant’s residence after his arrest, as well as the admission of the handguns into evidence. We disagree.

First, the prosecution introduced evidence of additional firearms and shells that police found during the initial search of the home, which occurred when defendant was present in the home. This evidence alone was sufficient to establish that defendant committed the charged offenses. In light of this evidence and the relatively tenuous connection between defendant and the handguns that defendant’s landlord later found in the residence, defense counsel could reasonably have chosen to limit the focus placed on the handguns and instead concentrate on addressing the presence of the other firearms, which was more problematic. An attorney’s decisions during trial are presumed to be strategic, “and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *Id.*

Second, defendant fails to show that his counsel would have been successful in a motion to suppress the handguns and ammunition. Counsel’s decision not to pursue a meritless objection does not constitute ineffective assistance of counsel. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Evidence concerning handguns found in defendant’s residence was relevant to whether defendant committed the charged offenses and, therefore, was probative. MRE 401; MRE 403.

Defendant argues that the handguns were not properly authenticated and, therefore, were not admissible. However, defendant’s landlord identified the guns as the ones he found in defendant’s apartment. Thus, sufficient evidence was introduced to show that the items were what they were purported to be. See MRE 901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”) Although defendant seems to argue that the prosecutor failed to sufficiently tie defendant’s use of the apartment to possession of the firearms found within, this question was one for the jury to decide. The jury could properly reach a conclusion that defendant was in constructive possession of these handguns, as well as the other guns found in defendant’s apartment, if the jury believed the landlord’s testimony. Thus, although the parties could argue about the proper inference to be drawn from the presence of the handguns in the apartment, counsel would likely not have prevailed had he moved to suppress this evidence on the ground that the evidence was not properly authenticated.

Moreover, even if the handguns were not admitted, ample evidence was still presented to connect defendant to the other firearms located in his home. The handguns were cumulative evidence at best. Defendant concludes that the jury would have acquitted him without this handgun evidence because the jurors would have believed defendant’s uncle’s testimony that he, not defendant, brought the firearms into the residence. However, this is mere speculation. Thus, there is no indication that the results of the proceeding would have been different had counsel objected.

Next, defendant argues that he was prevented from having an impartial jury because the jurors were allowed to ask questions of witnesses. Defendant contends that allowing a jury to ask questions of the witnesses may prevent jurors from keeping an open mind until all evidence is in, and it may upset the burden of production and persuasion in a criminal trial. We disagree.

We generally review a trial court's decision to allow the jury to ask questions of trial witnesses for an abuse of discretion. *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972). However, because defendant did not raise this issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant essentially maintains that jurors should never be allowed to ask questions. This contradicts *Heard*'s rationale that juror questions can sometimes shed light on confusing factual presentations. See *Heard*, *supra* at 187-188. Defendant's citation to outside authority espousing a different rationale does not show that the trial court committed plain error by exercising the discretion that our Supreme Court has granted Michigan courts. In the instant case, the juror's question was relevant, and it was properly designed to shed light on defendant's possible knowledge of the firearms that his uncle had allegedly placed in the home without defendant's knowledge. Defendant cannot show that the trial court plainly erred when it permitted the juror to question defendant's witness.

Next, defendant argues that the prosecution presented insufficient evidence that defendant constructively possessed the firearms found in his residence. We disagree. We review the sufficiency of the evidence to sustain a conviction de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Possession of a weapon can be constructive or actual. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession of a firearm exists where "the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471. "Physical possession is not necessary as long as the defendant has constructive possession." *Id.* at 471. Possession can also be established by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

Here, the prosecutor presented evidence and testimony regarding guns that were found in defendant's home, along with evidence of a knife found in defendant's basement. Defendant's uncle testified that he had left the guns in defendant's bedroom on his bed, even though the police discovered the guns elsewhere in the home. Based on this evidence, a rational trier of fact could have found sufficient evidence to conclude that defendant constructively possessed the guns found in his home. Because defendant rented the home and the firearms were left in his bedroom, a reasonable juror could conclude that defendant had reasonable access to the firearms. This testimony also supports a finding that defendant knew of the existence and the location of the firearms. The jury could reasonably infer that defendant moved the weapons from his bedroom to their hiding place under the mattress in the other bedroom. We depend on the jury's assessment of the facts to determine whether defendant had possession of the firearms in question. See *Hill*, *supra* at 469.

To the extent that defendant's argument is predicated on the credibility of his testimony, his claim of error fails. We defer to the jury's superior ability to assess the credibility of witnesses. *People v Kris Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Thus, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to enable

a rational trier of fact to find that defendant knew the location of the firearms and had access to them. See *Hill*, *supra* at 470-471.

Defendant next argues that the trial court considered the wrong sentencing guideline range during defendant's sentencing and that he is thus entitled to resentencing. We agree. We review defendant's unpreserved error for plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

The parties agree that the trial court calculated and relied on an incorrect guidelines range and that the correct guidelines range was 10 to 46 months. MCL 769.34(10) states, in pertinent part, "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Thus, although defendant's sentence fell within the correctly scored guidelines, the trial court relied on inaccurate information when sentencing defendant. We therefore find that resentencing is required. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Next, defendant argues that he is entitled to jail credit for time served between the time of his arrest and his sentencing hearing against the immediate charge because he cannot obtain credit toward his parole in Wisconsin. We disagree. According to *People v Seiders*, 262 Mich App 702, 707-708; 686 NW2d 821 (2004), defendant is not entitled to credit on his Michigan sentence for time served. Although defendant argues that *Seiders* was incorrectly decided, "[a] panel of this Court 'must follow the rule of law established by a prior published decision . . .'" *People v Petros*, 198 Mich App 401, 406 n 3; 499 NW2d 784 (1993), quoting Administrative Order No 1990-6, 436 Mich lxxxiv. We decline to revisit this issue.

Finally, the parties agree that defendant's judgment of sentence should be amended to accurately reflect the fact that defendant was sentenced as a third habitual offender. We agree.

Affirmed in part, reversed in part, and remanded in part for resentencing and for correction of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly